No. 91-419

IN THE

Supreme Court of the United States

October Term, 1990

ADAM SOMMER, an infant, by Laura Sommer, his mother, individually in his capacity as contingent beneficiary under the Last Will and Testament of Sigmund Sommer, Deceased,

Petitioner,

against

JOHN D. BENNETT, ESQ., individually and as Guardian Ad Litem appointed by Order of the Surrogate's Court, County of Nassau, for ADAM SOMMER,

and

JAMES D. BENNETT, ESQ., individually and in his capacity as Attorney for JOHN D. BENNETT, ESQ., Guardian Ad Litem appointed by Order of the Surrogate's Court, County of Nassau for ADAM SOMMER,

and

JAMES D. BENNETT, ESQ., ROBERT J. PAPE, ESQ., GEORGE F. RICE, ESQ. and RICHARD J. SCHURE, ESQ. d/b/a BENNETT, PAPE, RICE & SCHURE, in their capacity as Attorneys for John D. Bennett, Guardian Ad Litem appointed by Order of the Surrogate's Court, County of Nassau, for ADAM SOMMER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief in Opposition to Petition for a Writ of Certiorari

JOHN J. BOWER, ESQ.
BOWER & GARDNER
Attorneys for Respondents
110 East 59th Street
New York, NY 10022
(212) 751-2900

On the Brief:
NANCY LEDY-GURREN
JUDITH A. DAVIDOW

THE REPORTER COMPANY, INC., 30 Vesey St., New York, NY 10007—1991
NYC 212-732-6978 Westchester 914-681-1322 Long Island 516-222-0221
(7012—LC4-649)

Table of Contents.

	Page
Statement of the Case	2
A. Nature of the Case	2
B. Statement of Facts	3
1. The Amended Complaint	4
2. The Infant-Petitioner's Interest Under the Sommer Will	5
3. The Surrogate Court Proceedings	6
(a) Guardian Bennett's Appointment	7
(b) The Proceedings to Challenge the Settlement	8
4. The Interplay Between This Action And The Surrogate Court Proceedings	10
5. The Decision of the District Court	11
(a) Standing	11
(b) Ripeness	13
(c) The Probate Exception	13
6. The Decision of the Court of Appeals for the Second Circuit	14

Page

POINT I. A writ of certiorari should not issue on the basis of the application of the probate exception or the abstention doctrine to this case.... 14

POINT II. A writ of certiorari should not issue on the basis of the Second Circuit's holding that this case is not justiciable..... 18

A. Standing..... 19

B. Ripeness..... 20

POINT III. The respondent's failure to file a 3(g) statement does not constitute grounds for issuance of a writ of certiorari..... 24

Conclusion 26

TABLE OF AUTHORITIES.

CASES:

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967)..... 21, 23

Baker v. Carr, 369 U.S. 186 (1962)..... 19

Celentano v. Furer, 602 F. Supp. 777 (S.D.N.Y. 1985)..... 17, 18

Comas v. Southern Bell Tel. & Tel. Co., 657 F.Supp 117 (S.D. Fla. 1987)..... 18

Ford v. Moore, 79 A.D. 2d 403, 436 N.Y.S.2d 882 (1st Dept. 1981)..... 17

Page

Lucky-Goldstar Int'l., Inc. v. S.S. California Mercury, 750 F.Supp. 141 (S.D.N.Y. 1990) 24

Metzenbaum v. Federal Energy Regulatory Com'n, 675 F.2d 1282 (D.C. Cir. 1982) 20

Miller v. Swissre Holding, Inc., 731 F.Supp. 129 (S.D.N.Y. 1990)..... 24, 25

Markham v. Allen, 326 U.S. 490 (1946)..... 15

New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 833 F.2d 583 (5th Cir. 1987)..... 21

Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978) 21

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 19

Rice v. Rice Found., 610 F.2d 471 (7th Cir. 1979)..... 15, 16

Salahuddin v. Coughlin, 674 F.Supp. 1048 (S.D.N.Y. 1987)..... 24

Town of Rye, N.Y. v. Skinner, 907 F.2d 23 (2d Cir. 1990), *cert. denied,* 111 S. Ct. 673 (1991)..... 21, 22

Trustees for Alaska v. Hodel, 806 F.2d 1378 (9th Cir. 1986)..... 21

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982)..... 19

Page

Waterman v. Canal-Louisiana Bank and Trust Co., 215 U.S. 33 (1909) 15

Warth v. Seldin, 422 U.S. 490 (1975)..... 19

Whitmore v. Arkansas, 110 S.Ct. 1717, 58 U.S.L.W. 4495 (1990) 19

Zeno v. Cropper, 650 F.Supp. 138 (S.D.N.Y. 1986).. 24

TREATISE:

Wright, Miller and E. Cooper, Federal Practice and Procedure: 13 Jurisdiction §3532 20

RULES:

Local Rule of Civil Procedure 3(g)..... *passim*

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990.

ADAM SOMMER, an infant, by Laura Sommer, his mother, individually in his capacity as contingent beneficiary under the Last Will and Testament of Sigmund Sommer, Deceased,

Petitioner,

against

JOHN D. BENNETT, ESQ., individually and as Guardian Ad Litem appointed by Order of the Surrogate's Court, County of Nassau, for ADAM SOMMER,

and

JAMES D. BENNETT, ESQ., individually and in his capacity as Attorney for JOHN D. BENNETT, ESQ., Guardian Ad Litem appointed by Order of the Surrogate's Court, County of Nassau for ADAM SOMMER,

and

JAMES D. BENNETT, ESQ., ROBERT J. PAPE, ESQ., GEORGE F. RICE, ESQ. and RICHARD J. SCHURE, ESQ. d/b/a Bennett, Pape, Rice & Schure, in their capacity as Attorneys for John D. Bennett, Guardian Ad Litem appointed by Order of the Surrogate's Court, County of Nassau, for ADAM SOMMER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief in Opposition to Petition for a Writ of Certiorari

Statement of the Case

A. Nature of the Case.

In this diversity action, petitioner Adam Sommer, a contingent beneficiary under the will of his grandfather, seeks to recover damages and surcharges against: (1) John Bennett, the Guardian Ad Litem ["Guardian Bennett" or "Guardian"] appointed to represent the Sommer grandchildren in proceedings to settle the Executors' account of the Estate of Sigmund Sommer ["Estate"] and (2) the Guardian's attorneys, the firm of Bennett, Pape, Rice & Schur ["Bennett Firm"] [D 1-2].* Petitioner alleges that the Guardian, and his counsel, breached various duties to the infant ward, by failing to properly detect, uncover and remedy defalcations of duty, and consequent waste of the Estate's assets, by one of the Estate co-executors, Murray Felton ["Felton"].

In the district court, respondents moved to dismiss the action in its entirety for lack of subject matter jurisdiction, the failure to join necessary parties and a failure to state cognizable damage claims, and requested that the motion be treated as one for summary judgment [D 2-3]. The district court (Mishler, J.) converted the 12(b)(6) motion into one for summary judgment pursuant to the provisions of Fed.R.Civ.P.12 [D 3]; by order and judgment entered September 24, 1990 [C 1-2], Judge Mishler granted accelerated judgment on the grounds of a lack of justiciability (for lack of standing and ripeness), and alternatively dismissed upon the probate exception to diversity jurisdiction [C 2, D 1-86].

---

*All parenthetical references preceded by the letters "A", "B", "C" or "D" refer to the Appendices contained in the Petition.

Petitioner then appealed to the Second Circuit Court of Appeals, which, by summary order dated April 19, 1991 [B 1-4], affirmed the decision on the specific bases of a lack of standing and ripeness, as delineated in the district court's opinion. [B 3] This petition for a writ of certiorari follows.

Petitioner defines three infirmities in the Circuit Court's order which purportedly merit review by this Court: (1) that the affirmance creates conflicting authority among the Circuits with respect to the probate exception to diversity jurisdiction; (2) that the Second Circuit applied the principles of standing and ripeness in a manner inconsistent with this Court's decisions; and (3) that the order sanctioned a departure from the accepted and usual course of judicial proceedings. In fact, each such claim is meritless; the petition constitutes no more than an exercise in reargument.

B. Statement of Facts

This lawsuit, which purports to assert a variety of tort and statutory claims against the Guardian and his counsel, has as its genesis events occurring during the probate of the Estate of Sigmund Sommer. In fact, this action is but the latest installment in a vigorous, and on-going, dispute between the Sommer family and one of the Estate's executors, Murray Felton—a dispute which, as noted by the district court, has long-occupied the resources of the Surrogate's Court in Nassau County.[1]

Petitioner's recitation of the facts [Petition pp. 3-27] is a skewed version of the events which finds little support in the record. While there are persistent vitriolic attacks on the parties, [*id.* at 5, 9-10], the former Estate Executors [*id.*

[1]In fact, the district court, obviously overwhelmed by the quantity of proceedings initiated by the Sommer family, aptly chose to entitle the rendition of prior procedural history as "Bleak House" [D 23].

at 20], the New York State Court system [*id.* at 52-53] and respondent's counsel [*id.* at 51], there is no attempt to accurately delineate the prior proceedings or the decisions below. The inaccuracies of petitioner's version of the facts require a complete recitation of the events, so as to manifest the utter lack of merit of petitioner's request for the issuance of a writ of certiorari.

1. The Amended Complaint

The accusatory pleading alleges fraud [Count I], breach of statutory duties [Counts II and III], negligence [Counts IV, V, VI and VII] and breach of fiduciary duty [Count VIII] [D 37]. The gravamen of the charges is that the Guardian Bennett, and the Bennett Firm, breached their duty to the petitioner by failing (either deliberately or negligently), during the course of Estate proceedings, to recognize or remedy improprieties committed by the co-executor Felton and his counsel, the law firm of Dreyer and Traub ("D&T") [D 37-49]. The amended complaint recites a litany of wrongdoings by Felton and D&T, occurring *prior* to Guardian Bennett's appointment, including: (1) the improper sale of two real estate proprieties for less than actual value [D 42]; and (2) breaches of Felton's fiduciary duties through self-dealing and the misappropriation of Estate assets [D 46]. Petitioner avers that such conduct on the part of Felton and D&T deprived the Estate of millions of dollars in assets and income [D 48].

The charges against Guardian Bennett and his counsel, while quite prolix, reduce themselves to the fundamental claims that the Guardian: (1) failed to detect and uncover, in his review of the settlement of the Executor's account, the *prior* misdeeds of Felton and D&T; (2) filed misleading, or perjurious, reports to the Surrogate which improperly led to the probate court's closing of the Estate; (3) failed to disclose conflicts of interest of the Guardian, his assistants

and his counsel, which compromised the fidelity of such representatives to Adam Sommer; and (4) failed to take action, in the face of information as to improprieties by Felton and D&T, to reopen the Estate and thus recapture lost Estate assets [D 37-49]. While petitioner's counsel works hard to disassociate the claims in this action from the probate proceedings, it is manifest that the two are inextricably bound. Only matters yet to be determined by the probate court will serve to define, crystallize, establish or disaffirm the claims here. It was this recognition that properly led the district court and the Circuit Court to conclude that this action lacked justiciability.

2. The Infant-Petitioner's Interest Under the Sommer Will.

Sigmund Sommer died on April 30, 1979 [D 4], and was survived by his widow, Viola Sommer, and three children: Jack Sommer, Susan Sommer Schweitzman and Barbara Sommer Fisher [D 4]. On the date of death, Sigmund Sommer was also survived by seven grandchildren, one of whom is petitioner [D 4].

The Sommer Will [D 5] dated April 3, 1977, controlled the disposition of the decedent's property, and appointed Viola Sommer, Felton and Bankers Trust Company as executors and trustees [D 5]. The Will also designated D&T as attorneys for the Estate and the Trusts [D 5].

The Will created two trusts [D 5]. The first, contained in the Fifth Article (hereinafter "Article Fifth Trust"), established a marital deduction trust in favor of Viola Sommer, with the principal payable, upon the death of the widow, pursuant to a general power of appointment to be exercised in the Will of Viola Sommer [D 6].

The second trust, contained in the Sixth Article [hereinafter "Article Sixth Trust"] established a trust, consisting of the rest, residue and remainder of Sigmund Sommer's Estate [D 6]. The income of that trust was to be distributed, in the sole discretion of the trustees other than Viola Sommer, annually to Viola Sommer and to the three adult Sommer children, per stirpes [D 6]. Pursuant to the terms of this trust, income was to be distributed to grandchildren *if and only if* one of the Sommer children died [D 6-7]. Upon the death of Viola Sommer, the principal of the trust was to be distributed pursuant to the Seventh Article of the Will [D 7].

Under the Seventh Article, the grandchildren possess a contingent remainder interest in the *principal* of the Article Sixth Trust [D 8, 78]. With regard to income, they possess a contingent future interest: for trust income of the Article Sixth Trust to go to a grandchild, one of the Sommer children must die [D 8, 79]. This is an important recognition because at the time of all of Felton's and D&T's activities and conduct, Viola Sommer was (and is still) alive and none of Sigmund and Viola's children were (or are) deceased. Accordingly, to this day, the grandchildren have never had an interest in the income which is the subject of the dispute over the Executor's accounting and their interest in principal remains contingent.

3. The Surrogate Court Proceedings.

Viola Sommer's and Felton's relationship apparently began to deteriorate soon after they began managing the Sommer Estate [D 9]. In fact, in 1984, Jack Sommer (Viola Sommer's son and Laura Sommer's husband) had his lawyers prepare a memo detailing allegations of fraud and mismanagement against Felton [D 9-10].

Due to the growing acrimonious nature of Felton's relationship with Viola Sommer, Murray Felton petitioned the Surrogate to file a final accounting of the Estate in August of 1984 [D 9]. Later that year, Viola Sommer and Murray Felton seemingly ironed out their dispute and entered into a new commission agreement which changed the terms of a prior agreement executed in 1980 [D 11]. Viola Sommer, represented by independent counsel, joined in the final accounting of the Estate and petitioned the Surrogate for its approval [D 12-14]. In addition, Viola Sommer and Jack Sommer executed releases for Felton and D&T [D 12-13].

(a) Guardian Bennett's Appointment

In conjunction with the proceeding to settle the final accounting of the Executors, Bennett was duly appointed, by order of the Nassau County Surrogate's Court dated November 13, 1984, to protect the interests of the infant grandchildren [D 14].[2] Four other attorneys were appointed to assist the Guardian with his duties [D 15]. Together they made an in-depth review of the Estate and submitted several reports to the Surrogate concerning their findings [D 16].

The guardian reports revealed that Guardian Bennett's investigation entailed an exhaustive and detailed inquiry

[2]Contrary to petitioner's claims [Petition pp. 6-7, 19], Bennett was not appointed due to "improper taking of and waste of Estate assets, revealed to the Surrogate's Court by the Sommer family." No such revelations to the court or to Bennett took place. This new allegation is but one of the new embellishments of the facts which surfaces for the first time with the Petition. The record reveals that although the Guardian was aware that Viola and Felton had some disagreements, the depth of their dispute was hidden and not known to him. At the time that Jack Sommer's memo detailing the alleged wrongdoing of Felton was first prepared and circulated, the Guardian had no knowledge of it. In fact, he did not learn of this memo until October of 1987 [D 28], after the closing of the Estate.

into the administration of the Estate and that no objection to the account had been raised by any interested party [D 20]. Further, based upon the documents provided to Guardian Bennett, he had no objection to the final accounting, and recommended that it be judicially settled covering the acts of the executors and trustees through December 31, 1985 [D 20]. The Guardian raised no objection to the commissions to be paid to Felton, by agreement, in lieu of his statutory commissions [D 19-20].[3] The Surrogate's Court issued its final decree of the judicial accounting of Felton and Sommer on September 24, 1986 [D 22-23]. The closing of the Estate having occurred, the Sommer challenge to the proceedings began.

(b) The Proceedings to Challenge the Settlement.

By order to show cause, Viola Sommer brought a petition in the Surrogate's court to vacate and open the decree settling the final account [D 23]. The basis of Viola Sommer's petition were allegations charging Felton and D&T with fraud, duress, coercion, misrepresentation, overreaching and abuse of a confidential relationship [D 23]. Guardian Bennett was then appointed to act as guardian *ad litem* for the infant wards in this proceeding [D 26]. He submitted a report stating that he had *no objection* to Viola Sommer's application to set aside the decree to the extent of any measurable benefit for his wards [D 29-30]. He also *reserved his rights* to examine Felton, Viola Sommer and D&T with respect to the allegations [D 39, 59]. By decision dated October 4, 1988, the Surrogate agreed to open the Estate decree to the extent of determining whether Viola Sommer was incapable of freely and rationally giving her

[3]All unpaid commissions were chargeable to *income* (in which the infant wards had no interest) and of the commissions theretofore paid, only about $1.8 million had been charged against principal. The Guardian's report reveals that the agreed commissions were far less than the available statutory commissions [D 19].

consent to the 1984 settlement agreement by reason of duress, coercion, fear or intimidation exerted by Felton and D&T [D 30-31].

During the pendency of the petition to reopen the estate, Laura Sommer, Adam's mother, made numerous attempts to compel the Guardian Bennett to institute a parallel proceeding in the Surrogate's Court and to recuse Judge Radigan [D 31-34].[4] Ultimately, after Guardian Bennett's credibility was directly put in issue, Judge Radigan recused himself, finding he could not fairly adjudicate such issue due to his long-standing professional relationship with the Guardian [D 34-35].[5] All outstanding matters were then referred to Acting Surrogate Harrington who denied Laura Sommer's outstanding applications [D 35-37].

At the time of Laura Sommer's efforts to compel a reopening by the Guardian, Bennett believed that opening the Estate could detrimentally impact upon his wards [D 29].[6] He, therefore, recognized that it was best for the wards to await the outcome of the discovery proceedings before he instituted a parallel action in the Surrogate's

---

[4]Laura Sommer's voluminous applications, motions and tactics before the Surrogate are fully and completely set forth in the decision of Judge Mishler [D 31-34]. These actions included: (1) a motion to intervene to open and vacate the estate decree and to compel the Guardian to institute a parallel proceeding, (2) an order to show cause for the recusal of Judge Radigan and the disqualification of Guardian Bennett and (3) an application to the New York Supreme Court to recuse Judge Radigan [D 31-34].

[5]Besides hysterical hyperbole, there is nothing to petitioner's allegations that respondents were in league with the Surrogate Court, Felton and D&T [Petition, pp. 5, 23]. No such conspiracy exists. Rather, Guardian Bennett is a well respected former surrogate judge, and Surrogate Radigan had been his law clerk [D 35-36]. Moreover, there is no proof of a relationship between the Guardian and Felton or D&T.

[6]The final accounting of the estate awarded the wards certain vested interests which were obtained due to the efforts of Guardian Bennett [D 20-23].

Court or joined in the pending action by the Sommers [D 33]. Of critical significance here is the fact that the infants' rights have *not* been compromised; they are yet the subject of determinations to be made by the Surrogate. There has been no waiver or abandonment of the ability of the infants (including Adam Sommer) to challenge the settlement of the Estate, or take steps to reopen, should that effort be in their best interests [D 59].

In light of petitioner's allegations against Guardian Bennett, he sought the advice and direction of the Surrogate as to whether to continue to serve as guardian *ad litem* [D 50]. Thereafter, Guardian Bennett suffered a stroke [D 58-59] and upon request of the Bennett Firm, the Surrogate permitted him to resign [D 59]. The Surrogate appointed a new Guardian and Guardian Bennett prepared a final report [D 59]. The new guardian has the benefit of Guardian Bennett's reservation of rights and can act on it in any way he sees fit, including the institution of a parallel proceeding [D 59].

4. The Interplay Between This Action And The Surrogate Court Proceedings.

All of the petitioner's allegations are related to the wrongdoing alleged by Viola Sommer against Felton and D&T. Petitioner's counsel scrupulously ignores the prior proceedings and attempts to divert this Court from the manifest interplay between this action and the matters before the Surrogate. At the behest of Viola Sommer, the conduct of Felton and D&T is currently under scrutiny before the probate court, for the precise purpose of determining whether a re-opening will occur. Discovery in that proceeding will illuminate the allegations of wrongdoing and will enable the current Guardian, like Guardian Bennett before him, to determine whether a re-opening of the Estate is in the best interests of the petitioner. In fact, this

action specifically challenges the Guardian's decision on that issue—a decision which clearly involves *on-going judgments* to be made in the course of Surrogate proceedings.

It is only an orderly completion of the Surrogate proceedings which will determine whether fraud and coercion by Felton and D&T occurred, whether the proceeding can be re-opened, and whether the petitioner stands to benefit from a re-opening. Until such determinations are made, and until *known rights* of the petitioner are *foreclosed,* there can be no real assessment, on the current tort liability claims, of whether there was a breach of duty or whether any damage to the infant-petitioner's rights has occurred. For these reasons, the Circuit Court, like the district court, determined that dismissal was warranted for a lack of justiciability.

5. The Decision of the District Court.

The district court's dismissal was premised on three distinct grounds: standing, ripeness and the probate exception to diversity jurisdiction. Each determination was eminently correct, and fully supported by both the uncontested facts and the controlling law.

(a) Standing.

In its analysis of Adam Sommer's "personal stake" in this litigation, the district court was constrained to examine the petitioner's interest in the Estate, as delineated in the Sommer Will [D 4-8]. The lower court concluded, on the basis of the uncontested evidence, that Adam Sommer has a contingent remainder interest in the *principal* and *future income* of the Article Sixth Trust. His interest in future income will vest only if his parent, Jack Sommer, should die [D 6-7, 78-79]. The court correctly concluded that Adam has no interest in past income, meaning income already

paid to income beneficiaries [D 79]. The court, then, made a crucial recognition—that this lawsuit concerns conduct by the Estate executors (and defendants' review thereof), which began on May 1, 1979 and ended on December 31, 1985 [D 80]. Accordingly, to the extent that assets of the Estate were "wasted," and to the extent that those assets represent *income* to the trust, it represents past income in which Adam Sommer has no interest [D 80]. The court, in interpreting the Will, recognized that Adam does have a contingent future interest in principal and concluded that, to the extent that the lawsuit implicates the loss of principal, Adam may have a personal stake in the outcome [D 80-82].

Judge Mishler then endeavored to identify which counts of the complaint implicated either principal or income. He noted that the vast majority of the claimed losses involved only *past* income (in which Adam has no interest) [D 80-81]. The only "damage" claimed which effects principal, he concluded, was the $1,840,750 of commissions that were charged to principal, and the undervalued sale of the 48th and 53rd Street properties [D 80]. The court concluded that, even reading them in the light most favorable to the plaintiff, only four counts involved either the commissions or the properties: Count I (fraud), which alleged a failure to have an independent appraisal of the properties; Count III (breach of statutory duties), which avers that the Bennett Firm failed to insist on such appraisals; Count IV (negligence), which alleges misappropriation by Felton, and thus can be assumed to include the executors' commissions agreement; and Count VIII (breach of fiduciary duty), which again is premised on a failure to obtain appraisals of the properties [D 80-81]. The court ruled that these were the only claims in which Adam had a demonstrable interest: the remaining claims involved allegations which did not implicate the commissions or

properties and, hence, involved only past income in which petitioner has no interest [D 80].

(b) Ripeness.

The court further determined that, even as to those claims which implicated principal, the matter was not yet sufficiently ripe for review [D 82]. The district court appropriately concluded that "injury" to Adam's interests was not yet distinct and palpable, because it hinged on several contingent or uncertain events, i.e., whether the Estate was re-opened, whether there was a finding of misconduct by Felton and whether the current Guardian acts, and in which way he acts, on rights reserved by Guardian Bennett [D 82]. The court was correct in its recognition that it is only *when* these matters are resolved that a definitive determination can be made as to whether there has been a palpable injury to Adam Sommer's interest [D 82-83].

(c) The Probate Exception.

The district court also alternatively dismissed on the basis that the court lacked subject matter jurisdiction due to the probate exception to diversity jurisdiction. Here, Judge Mishler aptly recognized that jurisdiction is lacking when the litigation of the action will interfere with state probate matters [D 84, 86]. The district court recognized that the litigation of the issue of "injury," which is a necessary finding to petitioner's alleged tort claims, would work such an interference. Whether Felton's commission agreement is invalid, whether Felton and D&T committed fraud, and whether assets of the Estate were wasted (all of which must be determined in order to find that Adam Sommer had been injured) are matters currently pending before the state probate court. Thus, Judge Mishler concluded, "to force the claims to ripeness would involve interference with the pro-

ceedings in the probate court." [D 85-86] For these reasons, the court properly ordered dismissal.

6. The Decision of the Court of Appeals for the Second Circuit.

The Court of Appeals for the Second Circuit affirmed the dismissal of the complaint substantially on the basis of Judge Mishler's holdings regarding justiciability [B 3]. The Court held that to the extent that petitioner's claims focus on income payments in the past, he lacked standing for the reasons stated in Judge Mishler's opinion [B 3]. Moreover, the Court held that to the extent the claims focus on the petitioner's interest in principal, the claims are not ripe for the reasons stated in Judge Mishler's opinion [B 3]. The Court did not pass on the alternative grounds of the probate exception. Petitioner filed a petition for rehearing *en banc*, which was denied [A 2].

POINT I

A writ of certiorari should not issue on the basis of the application of the probate exception or the abstention doctrine to this case

Petitioner argues that the Second Circuit relied on the probate exception to diversity jurisdiction, and the abstention doctrine, in declining jurisdiction and suggests such determination is in conflict with decisions of other Circuits. In fact, petitioner's counsel misperceives both the scope of the decision and the applicable law.

First and foremost, the Second Circuit did not affirm the decision of the district court on the basis of the probate exception, but rather affirmed on the basis of the district court's holdings regarding standing and ripeness [B 3]. In

addition, although respondents argued below that the application of the abstention doctrine provided an alternative basis for dismissal, neither the district court nor the circuit court relied on abstention in finding that there was no subject matter jurisdiction. Accordingly, petitioner's arguments regarding the probate exception and the abstention doctrine are completely irrelevant to the issue of whether a writ of certiorari should issue.

In addition, even if the Second Circuit's order can arguably be read as authority regarding the probate exception, petitioner nonetheless fails to raise a legitimate and compelling ground for certiorari. It is well-settled that the federal courts generally do not have subject matter jurisdiction over probate matters even if there is diversity of citizenship between the parties to the lawsuit. *Markham v. Allen*, 326 U.S. 490, 494 (1946); *Waterman v. Canal-Louisiana Bank and Trust Co.*, 215 U.S. 33, 44 (1909). Moreover, even in the instance where a lawsuit does not involve a pure question of probate, the federal court will decline jurisdiction when the resolution of the suit in federal court "will result in 'interference' with state probate proceedings or the assumption of general probate jurisdiction." *Rice v. Rice Found.*, 610 F.2d 471, 475-476 (7th Cir. 1979).

It is beyond question that the instant action interferes with pending proceedings in the probate court concerning Viola Sommer's petition to vacate the Estate decree and open the Estate. In this case, all of Adam Sommer's allegations against his guardian ad litem and the Guardian's attorneys relate to their purported failure to remedy the alleged misconduct of Felton and D&T. As noted by the district court, to force the plaintiff's claims to ripeness would involve interference with the proceedings in the state probate court because it would require determinations concerning issues which may yet be determined by the Surrogate, including the propriety of Felton and D&T's conduct

and the validity of the 1984 Executors' settlement agreement. In point of fact, the Surrogate opened the Estate decree to determine whether Viola Sommer freely and voluntarily agreed to the final accounting of the Estate. If it is ultimately determined that she did not, the Surrogate will then consider Viola Sommer's allegations of wrongdoing against Murray Felton and D&T. The issue below was the interference with probate proceedings, and the district court determined that this was inextricably bound to the ripeness issue. The New York Surrogate currently has before him the issue of the propriety of the Executor's Settlement. Whether the Estate can be re-opened on this basis will have a profound effect on determining the options available to Adam Sommer and whether, in fact, damage has occurred to his interests. The finding of the district court that this suit interfered with the matter currently before the probate court was eminently correct.

Petitioner suggests that a writ should be issued because the Second Circuit order conflicts with *Rice v. Rice Found.*, 610 F.2d 471 (7th Cir. 1979). Petitioner, however, provides no rational basis for this assertion. Examination of the *Rice* opinion demonstrates that there is no conflict between these cases. In *Rice v. Rice Found., supra,* the plaintiff claimed that he was deprived of his rightful share of the estates of both his parents by acts on the part of various defendants. At the time of the institution of the plaintiff's federal court action, the probate proceedings involving the parents' estates were pending in the state courts. The Seventh Circuit, *sua sponte,* raised the issue of the possible applicability of both the probate exception and the abstention doctrine. It noted that the relevant determination was whether the suit interfered with ongoing state probate proceedings. It also recognized that "[d]iscretionary abstention in probate-related matters is suggested not only by the strong state interest in such matters but also by special circumstances in particular cases." *Id.* at 477-78. However,

the Seventh Circuit did not resolve the question of subject matter jurisdiction, but remanded the issues to the district court.[7] Thus, the Second Circuit order in the instant matter does not conflict with the *Rice* decision: Judge Mishler's decision concerning the probate exception is in full conformity with the articulation of the probate exception as contained in the *Rice* opinion.

Petitioner also insinuates that certiorari should be granted because the Second Circuit's order herein conflicts with *Celentano v. Furer,* 602 F.Supp. 777 (S.D.N.Y. 1985). Again, petitioner provides little explanation of his position, but examination of the case proves the error of the argument. In *Celentano,* the plaintiff brought suit against the defendant, both in his individual capacity and as an executor of an Estate. The plaintiff sought damages for the breach of an agreement by the decedent to bequeath her certain property. The court found that it had jurisdiction because: (1) the suit did not implicate or tread upon the Surrogate's power over the estate or disposition of any property under its control and (2) there was concurrent jurisdiction in the N.Y. Supreme Court and the probate court over probate matters.

First, again assuming the Second Circuit's order relies on the probate exception (which it does not), *Celentano* is not a circuit decision, but a district court case of less precedential value. Therefore, any conflict does not provide a basis for certiorari. Second, petitioner's case is distinct from *Celentano* because the instant case involves allegations concerning the conduct of a guardian ad litem. A guardian ad litem is an officer of the Surrogate's Court, *Ford v. Moore,* 79 A.D.2d 403, 436 N.Y.S.2d 882 (1st Dept. 1981), and, therefore, it is the Surrogate's Court which has the power of

---

[7]There is no reported decision as to how the district court determined the applicability of the probate exception in *Rice.*

removal, supervision and surcharge. Unlike the *Celentano* case, if the court were to entertain jurisdiction in this case, it would interfere with and abrogate powers vested in the Surrogate to supervise the guardian ad litem. *See, Comas v. Southern Bell Tel. & Tel. Co.*, 657 F.Supp. 117, 118 (S.D. Fla. 1987).

Finally, *Celentano* is, at best, a muddled decision. While Judge Wienfeld seems to have broadly held that because the New York Supreme Court could have heard the matter, the probate exception did not apply, he also acknowledged that the federal court could not grant all the requested relief, implicitly holding that some issues might be purely probate matters. This is obviously a contradictory holding. Defendants submit that to the extent *Celentano* can be read to state that concurrent jurisdiction of the New York Supreme Court (a court of general jurisdiction) nullifies the probate exception, it is in error: if that were so, there would be no probate exception in any federal court sitting in New York.

POINT II

A writ of certiorari should not issue on the basis of the Second Circuit's holding that this case is not justiciable.

Petitioner also seeks a writ of certiorari on the ground that the Second Circuit's order, affirming the district court's decision on standing and ripeness grounds, conflicts with prior decisions of the Supreme Court. Examination of petitioner's arguments reveals that he has not put forth any persuasive reason for issuing a writ of certiorari; rather, petitioner merely presents a tortured rehashing of his arguments below.

A. Standing

The standing issue addresses "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal court jurisdictions and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin,* 422 U.S. 490, 498-99 (1975) (quoting *Baker v. Carr,* 369 U.S. 186, 204 (1962)). In order to establish standing under Article III, three requirements must be met: (1) the plaintiff must allege "injury in fact"; (2) there must be a "causal connection between the asserted injury and the challenged action"; and (3) "the injury must be of a type 'likely to be redressed by a favorable decision.' " *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 804 (1985); (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464 (1982)); *see also, Whitmore v. Arkansas,* 110 S. Ct. 1717, 58 U.S.L.W. 4495 (1990).

On the standing issue, petitioner does not delineate any existing conflicts among the circuits, but nonetheless asks the court to issue a writ to avoid conflict. He also reargues his claim that the Second Circuit misapprehended the scope of the claims and thus misapplied the doctrine of standing. Finally, petitioner insists that this case presents an issue of exceptional public importance. Each of these arguments is wholly lacking in merit.

First, petitioner's failure to articulate an existing conflict among the circuits on the standing issue mandates denial of his petition. Petitioner cannot support an application for a writ of certiorari merely by making vague and unclear assertions that clarification is in order.

Second, petitioner's argument that he has standing with respect to Counts II, V, VI, VII because they include claims of injury to future income is of no import. This is, again, an improper attempt to simply reargue his position. The Circuit Court's determination that, "to the extent that Sommer's claims focus on income payments in the past, he lacks standing" was a statement that *any* claims involving past income (wherever contained) were lacking justiciability. The Second Circuit went on to find that plaintiff's claims as to principal and future income were otherwise not justiciable on ripeness grounds. Thus, *all* of petitioner's claims are barred, irrespective of where contained, either on standing or ripeness. It is accordingly pointless for petitioners to argue as to which count of the complaint involves which genre of interest.

Finally, the petition raises absolutely no issue of exceptional public importance warranting the exercise of this Court's discretionary power to issue a writ. Other than to argue that this case is important to Adam Sommer, petitioner does not define an *issue* of pressing public importance. Issues of standing and ripeness, if determined so as to result in dismissal, always have negative impact on eager plaintiffs. This is a fact of litigation, not a watershed issue meriting review by this Court.

B. Ripeness

The central concern of the ripeness doctrine is that "the tendered case involves uncertain and contingent future events that may not occur as anticipated or may not occur at all." *Metzenbaum v. Federal Energy Regulatory Com'n.*, 675 F.2d 1282, 1289-90 (D.C. Cir. 1982) (quoting Wright, Miller and E.Cooper, Federal Practice and Procedure: 13 Jurisdiction §3532 at 237-38 (1975)). In determining whether a case is ripe for judicial consideration, two factors must be considered: (1) the fitness of the issue for judicial

decision, and (2) the hardship to the parties of withholding court determination. *Abbott Laboratories v. Gardner,* 387 U.S. 136, 149 (1967). A claim is considered fit for decision if the issues raised are primarily legal and do not require further factual development, and the challenged action is final. *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans,* 833 F.2d 583 (5th Cir. 1987); *Trustees for Alaska v. Hodel,* 806 F.2d 1378 (9th Cir. 1986). If the record does not demonstrate that the plaintiff suffered any injury, dismissal for lack of ripeness is appropriate. *Metzenbaum,* 675 F.2d at 1290. In addition, to meet the hardship test, the plaintiff must show either an actual injury or a real and immediate threat of injury. *Pence v. Andrus,* 586 F.2d 733, 738 (9th Cir. 1978).

On the ripeness issue, petitioner claims that certiorari should be granted because the Second Circuit decision conflicts with *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967) and *Town of Rye N.Y. v. Skinner,* 907 F.2d 23 (2d Cir. 1990), *cert. denied,* 111 S.Ct. 673 (1991). The petitioner also reargues his claims that Counts I, III, V and VIII are ripe because they allege injury to principal and the harm is complete. Finally, petitioner alleges that certiorari is appropriate because of alleged misstatements by respondents' counsel's at oral argument before the Second Circuit. Each of these arguments fails to provide a basis for the issuance of a writ.

Petitioner's argument that certiorari should be granted because the claims involve principal and the harm is complete is misguided. The certiorari process is not meant to provide petitioner with a forum to rehash his claims below. In addition, this argument completely ignores that there is an ongoing Estate proceeding (to re-open) which will affect whether petitioner will be in a position to allege an actual injury to his contingent interest in principal and future income as a result of the Guardian's conduct. For example,

the Estate may be reopened, the Surrogate may find that Felton and D&T were guilty of misconduct, and the present guardian may successfully bring a separate action which might redress any injury Adam may allege. Alternatively, the Estate may not be reopened, but the present guardian, acting on rights reserved by Guardian Bennett, may still institute such a proceeding and effect redress to the interests of Adam Sommer. Yet another alternative is that the Estate may be reopened, there may be a finding that Felton and D&T committed no misconduct, and that finding, binding on the Estate, will refute all claims of injury as a result of the Guardian's purported failure to remedy misconduct by Felton and D&T. These are some of the possible determinations which may result from the on-going Surrogate's Court proceeding. Therefore, it is patently clear that until the Estate proceedings are completed, any claim of certain injury is premature.

Additionally, petitioner's claim that a writ should issue because the decision herein conflicts with *Town of Rye v. Skinner, supra,* is utterly unpersuasive. First, any purported conflict between the instant case and *Town of Rye* does not present any conflict among the circuits since both cases emanate from the Second Circuit. Second, the two decisions are distinguishable and present no conflict. In *Town of Rye,* the petitioners alleged that a challenge to the FAA's approval of various projects at the Westchester County Airport was not ripe for review because funding for the project was uncertain. The court disagreed because there remained nothing else for the FAA to do in evaluating the environmental impact of the airport projects. In other words, the FAA's decision was final and not subject to change. By contrast, there are significant questions regarding the finality of Adam Sommer's purported injury in this case; there is a strong possibility that any purported injury may be redressed in the Surrogate's Court.

Similarly, petitioner's argument that the decision herein conflicts with *Abbott Laboratories v. Gardner, supra,* is also unavailing. In *Abbott Laboratories,* plaintiffs sought to enjoin the enforcement of certain regulations promulgated by the Commissioner of Food and Drugs which required certain labelling. At the time of the suit, the regulations had not been enforced against any of the plaintiffs. The court held that the case was ripe for judicial determination because the issuance of the regulations constituted the final agency action. By contrast, as noted, there is nothing final about petitioner's alleged injury. Petitioner's position, argued twice below, is that since Guardian Bennett's conduct is complete, injury to Adam Sommer is complete and certain. Petitioner's counsel persists in confusing the concepts of *conduct* and *damage:* as proved to the satisfaction of both the District and Circuit Courts, the determinations of the Surrogate will operate to define, establish or negate injury to Adam Sommer. Moreover, there is no demonstrable hardship to petitioner by the finding of a lack of ripeness. The Circuit Court's decision was in full conformity with established authority and does not warrant review by this Court.

Finally, petitioner cannot, as he attempts here, support a petition for a writ of certiorari by complaining that respondents' counsel's statements at oral argument before the Second Circuit misled the court. Such a charge is both unsupportable and dehors the record. Apparently, respondents' counsel has joined a fairly distinguished list of persons condemned by the Sommer Estate representatives. There is simply no truth to the charge, which was made to the Circuit Court and rejected. Moreover, such baseless accusations hardly constitute a sufficient showing for the issuance of a writ. Indeed, the mere fact that petitioner's counsel tries to manufacture such an issue reveals the frailty of his position before this Court.

POINT III

The respondent's failure to file a 3(g) statement does not constitute grounds for issuance of a writ of certiorari.

Petitioner also seeks a writ of certiorari on the basis that both the district court and the Court of Appeals sanctioned an "obvious and far departure from normal procedure" by granting respondents summary judgment in the absence of a 3(g) statement. Petitioner's contention is wholly without merit and places undue importance on the 3(g) process.

Rule 3(g) serves a valuable function because it requires parties to an action to define the issues in litigation. *Zeno v. Cropper,* 650 F.Supp. 138, 139 (S.D.N.Y. 1986). However, the courts are not required to blindly deny motions when the parties do not provide 3(g) statements when the affidavits, briefs and exhibits submitted on the motion clearly supply the uncontroverted facts pertinent to the motion. *See, Lucky-Goldstar Int'l, Inc. v. S.S. California Mercury,* 750 F.Supp. 141, 143 (S.D.N.Y. 1990); *Miller v. Swissre Holding, Inc.,* 731 F.Supp. 129, 130 (S.D.N.Y. 1990); *Salahuddin v. Coughlin,* 674 F.Supp. 1048, 1051-52 n.6 (S.D.N.Y. 1987); *Zeno v. Cropper,* 650 F.Supp. 138, 139-40 (S.D.N.Y. 1986). In fact, the language of the rule itself indicates that denial of a summary judgment motion for failure to file a 3(g) statement is discretionary—such a failure *may* " 'constitute grounds for denial of the motion.' " *Accord, Lucky-Goldstar, Int'l, Inc. v. S.S. California Mercury, supra* (citing Civil Rule 3(g)).

In a recent Southern District case, *Lucky Goldstar Int'l, Inc. v. S.S. California Mercury, supra,* the co-defendant argued that defendant was not entitled to summary judgment because it had not submitted a 3(g) statement with its initial motion papers. In declining to deny summary judg-

ment on this ground, the court noted that, "[w]here the facts required by the 3(g) statement can be gleaned from other documents submitted in support and opposition to the motion, failure to comply with Rule 3(g) does not compel denial." *Id.* at 143. The court also concluded that "it would serve no purpose to deny th[e] motion on the basis of this minor procedural error, particularly where no prejudice to the other parties . . . has been shown." *Id.* at 144.

Similarly, in *Miller v. Swissre Holding, Inc., supra,* the Southern District also declined to deny defendant's motion for summary judgment despite the fact that neither party submitted a 3(g) statement. Instead, the court set forth in its opinion a statement of the relevant facts which it compiled from all of the documents submitted in support of and in opposition to the pending motions.

Review of Judge Mishler's opinion reveals that the district court also compiled a statement of uncontroverted facts from the various documents submitted in support of and in opposition to the motion. Thus, there is no reason to assume that the lack of a 3(g) statement by the defendants hampered the judicial determination of the motion for summary judgment in any way. Petitioner's contention that the court was "forced" to adopt respondents' version of the facts is without any support whatsoever. This is especially so since the court had the assistance of petitioner's 3(g) statement.

Moreover, the failure to file a 3(g) statement was both inconsequential and harmless under the facts of this case. The grounds on which dismissal was sought were purely legal, and no factual disputes were pertinent to the court's decision.

Finally, respondents' "failure" to file a 3(g) statement is of no import because the procedural posture of this case required no such filing. Respondents moved for an order to dismiss, in lieu of answering, pursuant to Rule 12(b) and did not move for summary judgment pursuant to Rule 56. Local Rule 3(g) makes it abundantly clear that a statement of undisputed material facts is to be annexed to a notice of motion for summary judgment pursuant to Rule 56. The court's ultimate determination to convert the dismissal motion into one for summary judgment does not, contrary to the petitioner's erroneous assertion, require that such a statement be filed.

Conclusion

For all the reasons stated above, petitioner has failed to set forth any basis justifying review by this Court. The petition for a writ of certiorari should be denied in its entirety.

Dated: New York, New York
October 3, 1991

JOHN J. BOWER
BOWER & GARDNER
Attorneys for Respondents
110 East 59th Street
New York, NY 10022
(212) 751-2900